IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

DOCKET No. 280.

ROSCO JONES, *Petitioner,*

v.

CITY OF OPELIKA, *Respondent.*

On Writ of Certiorari to the Supreme Court of Alabama.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

OPINION.

The opinion of the Supreme Court of Alabama, reported in 3 So. (2d) 76, appears in the record at pages 3 to 9; the judgment of that Court appears in the record at pages 2 and 3. The opinion of the Alabama Court of Appeals in this cause is reported at 3 So. (2d) 74, and appears in the record at pages 62 to 65.

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)). The judgment of the Supreme Court of Alabama was entered on May 22, 1941 (R. 2). Review by this Court has been improvidently requested for this Court is without jurisdiction to consider the matters raised since the judgment of which petitioner complains is not final within the meaning of Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)) and the decisions of this Court thereunder.

QUESTION PRESENTED.

Whether or not the requirements of a municipal ordinance prescribing a schedule of license or privilege taxes for all trades, vocations, professions, and other businesses conducted within the City of Opelika deprived petitioner, a vendor of religious literature, of his Constitutional right of "freedom of press, speech or of conscience and the worship of Almighty God" in the face of his refusal to pay the prescribed tax and secure the license provided for by said ordinance.

MUNICIPAL ORDINANCE INVOLVED.

The "City License Schedule for 1939" is a municipal ordinance prescribing "the rates for license or privilege taxes for trades, vocations, professions, and other businesses conducted within the City of Opelika, Alabama, and its police jurisdiction", and containing "certain conditions and provisions for the conduct thereof" and "penalties for the violation of said ordinance." Separately listed therein are numerous trades, vocations, professions and other businesses, together with the rate of tax applicable to each, and prescribed machinery for the creation of other classifications not specifically listed in the ordinance. Among the trades, vocations, professions and businesses listed is that of "Book Agent (Bibles excepted)—$10.00." The condi-

tions and provisions of the ordinance provide for such things as licenses for a period less than one year, transfers of licenses, delinquencies, liens for the payment of the tax, and related matters. Section 1 of the ordinance (held to be invalid by the Alabama Court of Appeals, in a decision subsequently declared erroneous by the Supreme Court of Alabama) provides as follows:

> "1. Right of City to Revoke.
>
> All licenses, permits or other grants to carry on any business, trade, vocation, or professions for which a charge is made by the City shall be subject to revocation in the discretion of the City Commission, with or without notice to the licensee."

At the conclusion of the ordinance, the following separability clause is found (R. 38):

> "Should any section, condition, or profision [sic] or any rate or amount scheduled as against any particular occupation exhibited in the foregoing schedule be held void or invalid, such invalidity shall not affect any other section, rate or provision of this license schedule."

The ordinance, *in toto,* will be found at pages 21 through 38 of the Record.

CONSTITUTIONAL PROVISIONS INVOLVED.

Petitioner asserts that Amendment I and Section 1 of Amendment XIV of the Federal Constitution are violated by the operation of the foregoing ordinance in its effect on him.

> "Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Amendment XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Petitioner is a member of the group known as Jehovah's Witnesses,[1] and stated that he was a minister of the gospel. When arrested, he was going about the streets of the City of Opelika holding pamphlets in his hands and saying to the public: "Get your two copies for five cents."

Contrary to repeated assertions which are found at various parts of the petitioner's brief, there is no testimony in the record that the books were given away, or that "contributions" were sought. Petitioner was convicted on the testimony of the arresting officer to the effect that he was offering the books for sale. Petitioner has dealt at great length with the contents of these pamphlets, but it seems appropriate to the issues in this cause for respondent to state nothing more than that they were entitled "Facsism or Freedom" and "Face the Facts and Learn the Only Way of Escape;" generally set forth the gospel of the Kingdom of God as petitioner and others of his persuasion believed and preached it; and could not (and it is not so contended) be considered as a Bible and thus within the exception stated in the ordinance.

Regarding himself as sent by Jehovah God to do His work, and protesting that an application for license would have been an act of disobedience to Jehovah's Commandment, petitioner neither sought nor secured a license or

[1] For a discussion of previous cases in this Court, involving this group, see Chafee "Free Speech in the United States", p. 398 *et seq.*

offered to pay the $10 tax prescribed by the ordinance for an annual license for book agents, in which category he was placed. It is conceded that he "refused to apply for a license * * *" (Petitioner's brief, p. 22). He was arrested and convicted first in the Recorder's Court of the City of Opelika and subsequently on review in the Circuit Court on the charge of selling or offering for sale books without a license being first obtained from the City Clerk in accordance with the "City License Schedule of 1939" (R. 11, 16, 63, "City License Schedule for 1939," Section 4, R. 22). On appeal, the Court of Appeals of Alabama held that the conditions and provisions of the "City License Schedule," as applied to petitioner, were invalid and the conviction was set aside. In its decision reversing the lower court's conviction, the Court relied almost entirely on Section 1 of the aforesaid ordinance providing for revocation of licenses already granted. On petition for certiorari filed by the City of Opelika, the Supreme Court of Alabama reversed the Court of Appeals and remanded the cause to said Court for further proceedings therein.

SUMMARY OF ARGUMENT.

(a) Jurisdictional.

It is submitted that this Honorable Court is without jurisdiction on this appeal under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)) because of the fact that the judgment of the Supreme Court of Alabama to which this appeal is directed is not final within the meaning of the aforesaid Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)).

(b) The Merits.

The ordinance of the City of Opelika creates an ordinary, usual business privilege tax typical of many used throughout the country. Nothing on its face or established by extrinsic evidence warrants the conclusion that it prohibits in any unlawful manner the publica-

tion, circulation or distribution of press material or restrains the free exercise of religious beliefs. The doctrine of this Court announced in *Lovell* v. *Griffin*, 303 U. S. 444, making unlawful any municipal ordinance creating a previous restraint or a licensing or censorship on press material, is not applicable in the present case because the ordinance here is not directed at press activities, does not prohibit, censor or license the same, but instead is a simple tax statute covering all commercial callings within the jurisdictional environs of Opelika. The doctrine of this Court as announced in *Grosjean* v. *American Press Company*, 297 U. S. 233, in so far as it found illegal a "deliberate and calculated device in the guise of a tax to limit the circulation of information," not only is not authority for holding the present tax invalid, but by its very delineation between lawful and unlawful taxes of this character proves the one here involved to be good. The argument that the Opelika ordinance is invalid because Section 1 thereof permits revocation of licenses already granted "with or without notice to the licensee," is without merit for even though it were conceded that such a provision was improper the section is of no concern here since petitioner neither sought nor secured a license by paying the prescribed tax, and therefore cannot complain of a procedural section in no way affecting him. It cannot be said that because of its alleged invalidity the ordinance as a whole is invalid and therefore to be ignored, because Section 1 is separable from the ordinance under common law principles and further is made specifically separable by a separability clause contained in the body of the ordinance.

ARGUMENT.

A. Jurisdictional.

The Judgment of the Supreme Court of Alabama Sought to be Reviewed is Not a "Final Judgment or Decree," and Hence Not Subject to Review by the Supreme Court Under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)).

A serious question of jurisdiction presents itself immediately. The judgment of the Supreme Court of Alabama to which the petition for writ of certiorari is directed is not a final judgment on its face or in fact, and consequently is not subject to judicial review at this stage and in the manner sought. Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)) invoked by petitioner is unavailable to him since that Act limits the jurisdiction of this Honorable Court to the review and determination of a "final judgment or decree". Such a "final judgment or decree" is not present in the case at bar.

After petitioner's conviction in the Recorder's Court and Circuit Court, he appealed to the Court of Appeals of Alabama, setting forth various assignments of error totaling in all some thirteen specifications of error in which, among other things, he charged that (1) he had been denied a jury trial;[2] (2) a motion for new trial had been erroneously denied;[3] (3) a variance between proceedings in the Recorder's Court and Circuit Court had been allowed;[4] (4) error was committed in excluding certain testimony;[5] and (5) a motion to dismiss had been improperly denied.[6]

On appeal, however, the Court of Appeals of Alabama considered only those assignments of error which charged

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[2] Assignment of Errors—Fifth, R. p. 61.
[3] Assignment of Errors—Sixth, R. p. 61.
[4] Assignment of Errors—Four, R. p. 60.
[5] Assignment of Errors—Second and Third, R. pp. 59, 60.
[6] Assignment of Errors—First, R. pp. 56, 57.

the unconstitutionality of the Opelika ordinance, the "City License Schedule for 1939," as inconsistent with the First and Fourteenth Amendments to the Federal Constitution.[7] That Court said:

> "His (petitioner's) defense was the unconstitutionality and invalidity of the ordinance (as applied to him), which requires a license to distribute printed matter. He says that it is in conflict with the Constitution of the State, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution in the following particulars, viz.:
>
> (a) It abridges and denies freedom of speech and freedom of the press. And (b) It abridges freedom of worship and freedom of conscience and religious liberty."[8]

Nowhere in the opinion of that Court will there be found any reference to or decision on any of the other assignments of error relied upon by petitioner. Treating only of the ordinance and its alleged unconstitutionality, the Court found:

> "But, as applied to appellant, the ordinance, for reasons we hope we have made clear hereinabove, is invalid—void, and of no effect. * * *
>
> "The judgment of conviction rendered by the Circuit Court is reversed.
>
> "And a judgment here, and hereby, rendered discharging appellant from further custody in these proceedings.
>
> "Reversed and Rendered."[9]

On May [illegible], 1941, the Supreme Court of Alabama granted a petition for certiorari to the Court of Appeals of Alabama, deciding unequivocally that the intermediate appellate court's decision on this question was in error. It said:

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[7] Assignment of Errors—1-5 of A; B, C, R. pp. 57-59.

[8] R. p. 63.

[9] R. pp. 64, 65.

"It results from the foregoing that the opinion of the Court of Appeals is founded in error and the petition for writ of certiorari is hereby granted."[10]

The Supreme Court of Alabama neither considered nor decided any assignment of error other than those covered by the Court of Appeals in its decision. On the same day it issued its judgment granting the petition for the writ of certiorari to the Court of Appeals, reversing and annulling the judgment of the Court of Appeals and remanding the cause to that Court "for further proceedings therein." It provided:

"* * * It is therefore considered that the judgment of the Court of Appeals be reversed and annulled, and the cause remanded to said Court for further proceedings therein. * * *"[11]

This is the judgment to which the present petition for writ of certiorari is directed. It is not, we submit, a final judgment reviewable under Section 237 (b) of the Judiciary Act (28 U. S. C. A. 344 (b)) invoked by petitioner. It is not so on its face, nor is it in fact. Interpreting the requirement of finality contained in Section 237 of the Judiciary Act, this Honorable Court has said:

"We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. * * *

"* * * We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. * * *" *Haseltine* v. *Central Bank of Springfield, Missouri,* 183 U. S. 130, 131; see also *Schlosser* v. *Hemp-*

[10] R. p. 9.
[11] R. p. 3.

hill, 198 U. S. 173, 175; *Louisiana Navigation Company* v. *Oyster Commission of Louisiana*, 226 U. S. 99.[12]

That the doctrine of finality applies as well to review by certiorari is well settled. In *Bruce* v. *Tobin*, 245 U. S. 18,[13] involving proceedings on a petition for a writ of certiorari to the Supreme Court of the State of South Dakota, the Court discussed the new writ of certiorari provided for by Section 237 of the Judiciary Act. Mr. Chief Justice White, speaking for the Court, said:

> "The act in question, although it deprived of the right of review by writ of error which had hitherto obtained in certain cases and substituted as to such cases the right of petitioning for review by certiorari, subjected this last right to the same limitation as to the finality of the judgment of the state court sought to be reviewed which had prevailed from the beginning under Sec. 709, Rev. Stats., Sec. 237, Judicial Code. Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the Act of 1916."

And the Court reaffirmed the "face of the judgment" doctrine, particularly as relating to certiorari proceedings, when it said:

> "* * * But that contention is not open as it was settled under Sec. 709, Rev. Stats., Sec. 237, Judicial Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered,—a principle which excluded all conception of finality for the purpose of review in a

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[12] And *per curiam* decisions to like effect:
Edgar Bros. Co. v. *State Revenue Commission*, 303 U. S. 626.
J. Bacon & Sons v. *Martin*, 302 U. S. 642.
American Bakeries Co. v. *Huntsville*, 299 U. S. 514.
Moran v. *Loudoun National Bank*, 297 U. S. 698.
Mississippi Central R. R. Co. v. *Smith*, 295 U. S. 718.
Williams v. *H. C. Speer & Sons Co.*, 287 U. S. 562.

[13] Followed by this Court in *Augusta Power Co.* v. *Savannah River Electric Co.*, 284 U. S. 574; *Brannan* v. *Harrison*, 284 U. S. 579.

judgment like that below rendered. *Haseltine v. Bank*, 183 U. S. 130; *Schlosser* v. *Hemphill*, 198 U. S. 173; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 418, 419. The reenactment of the requirement of finality in the Act of 1916 was in the nature of things an adoption of the construction on the subject which had prevailed for so long a time.

"There being then no final judgment within the contemplation of the Act of 1916, the petition for a writ of certiorari is Denied."

In an effort to refute our position with respect to this jurisdictional question, respondent urged certain propositions of fact and law.[14] The facts relied upon are grossly inaccurate and the law obviously inapplicable.

There is no basis for saying, as did petitioner, that:

"* * * the judgment of conviction rendered and entered against the petitioner by the Circuit Court of Lee County, Alabama, was affirmed by the Supreme Court of the State of Alabama by reversing the judgment of the Court of Appeals of Alabama. The judgment of the Court of Appeals of Alabama disposed of the whole case on the merits. *The judgment of the Supreme Court of Alabama likewise disposed of the whole case on the merits and directed the Court of Appeals to enter a judgment affirming the Circuit Court's judgment instead of reversing the judgment of conviction and setting it aside, as was done by the Court of Appeals.*"[15] (Italics supplied)

And, just as there is nothing in the record of the proceedings of this case giving warrant or any justification for that statement, the clear, unambiguous language of the judgment of the Supreme Court of Alabama is sufficient to refute completely petitioner's conclusion that:

"Therefore the judgment of the Supreme Court of Alabama directed the Court of Appeals what judgment

[14] See Petitioner's Reply Brief (To Brief for Respondent In Opposition To Certiorari), pp. 1-3.

[15] Petitioner's Reply Brief, *supra*, pp. 1-2.

should be entered and left nothing to the judicial discretion of that Court or the trial court. The courts below have nothing to do but to execute the judgment already rendered."[16]

The four cases cited by petitioner in no manner support the general allegations made, and are of no application here. (1) *Rio Grande Railway Co.* v. *Stringham*, 239 U. S. 44, is authority for the proposition that a decision by a state supreme court reversing a lower court finding for the defendant in a suit to quiet title and remanding "the case with a direction to 'enter a judgment awarding to the plaintiff title to a right of way over the lands in question * * *' " was a final judgment. (2) *Board of Commissioners* v. *Lucas*, 93 U. S. 108, merely holds that a judgment of an appellate court reversing a decision of a lower court which had granted a temporary injunction, and remanding the cause to the lower court with instructions "to dismiss the complaint" was a final judgment. (3) *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, commenced with a suit brought in the Supreme Court of New York by stockholders against bank directors charging negligence. A demurrer, raising among other things the right of the state court to consider the matter, was sustained. The Court of Appeals " 'reversed and judgment rendered for plaintiff on demurrer with costs, with leave to the defendants to withdraw the demurrer within thirty days, on payment of costs * * * and to answer the complaint.' " From this judgment a writ of error was taken to the Supreme Court. On these facts the Court found that it was without jurisdiction because the judgment of the Court of Appeals was not final. Mr. Chief Justice Waite, delivering the opinion for the Court, said:

"The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error,

[16] Petitioner's Reply Brief, *supra*, p. 2.

must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. * * * The highest court of the State has decided that the suit may be maintained in the courts of the State. To that extent, the litigation between the parties has been terminated, so far as the State Courts are concerned, but it still remains to decide whether the directors have in fact been guilty of the negligence complained of and, if so, what damages the stockholders have sustained in consequence of their neglect. The Court of Appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can in no sense be said that the judgment we are now called on to review terminates the litigation in the suit."

(4) And finally, *Mower v. Fletcher*, 114 U. S. 127, merely supports the proposition for which we contend:

> "That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the Court below would have nothing to do but to execute the judgment it had already rendered."

There the judgment found to be final was one reversing the judgment of the Superior Court of Los Angeles County with directions to that Court "to enter judgment upon the findings for the plaintiff as prayed for in his complaint."

Applying the settled law to the case at hand, it is apparent that review in this Court may not be had at this stage of the proceedings. It is self-evident that the Court's decision does not finally dispose of the matter, as the intermediate court was specifically by it ordered to conduct further proceedings. In accordance with the "face of the judgment rule" it is unnecessary to go beyond this point to establish the proposition that the judgment in question is not ripe for Supreme Court review. But the facts here stand a

more searching test. It is clear that under the reversal and remand to the intermediate court that court could and undoubtedly should consider the other assignments of error presented to it but ignored in its decision, and take such further proceedings in accordance with the unequivocal mandate from its superior court.[17]

It is a well recognized rule that when an intermediate court has failed to pass on all matters properly before it the superior appellate court on reversal should remand the cause to the intermediate court for a determination of the issues not passed upon.[17a] And the highest Court of Alabama has ruled that when it reversed a judgment of its intermediate court, the Court of Appeals, which had dealt with but one of the assignments raised by appellant, on the remand the intermediate court was required to pass upon such assignments as remained undecided. In *Box* v. *Metropolitan Life Insurance Company*, 168 So. 217, the Alabama Supreme Court said:

> "(1) We observe that appellant assigned numerous errors on account of the rulings of the court on evidence made during the trial. We cannot consider them because the Court of Appeals has not done so since it was unnecessary because of their view of the sufficiency of the plea. But it is necessary on account of our view of that question. This cause must therefore be remanded to that court for further consideration.
>
> "Certiorari granted; judgment of the Court of Appeals reversed, and cause remanded to that court."

There can be no dispute but that in the case at bar, the Court of Appeals of Alabama, in its opinion failed to consider numerous assignments of error advanced by petitioner as a substantial part of his grounds for the request that the Circuit Court's judgment be reversed. This undoubtedly was because in its view on the constitutionality

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[17] See *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 795, 796.

[17a] 25 Corpus Juris Secundum, p. 1471, Par. 1945.

of the ordinance it was unnecessary to consider the other assignments. It has now been told, however, by the Supreme Court of the State that its view on this subject was in error and that Court has reversed the judgment of the Court of Appeals and remanded the cause to that court "for further proceedings therein." On such further proceedings, the Court of Appeals must take cognizance of the Supreme Court's view with respect to the constitutionality of the ordinance but is unfettered in other respects from considering for the first time the other assignments dealing with the exclusion of witnesses, the right of jury trial, variance in the charges and other matters raised (see p. 7 herein). Not only is the Court of Appeals not hampered in so doing, but we submit it is required to consider these matters under the mandate of the Supreme Court, consistent with established principles.[17b]

This being so, the rule "that this court may not be called upon to review by piecemeal the action of a state court"[18] applies, and the judgment should be found to lack that finality which is a *sine qua non* of review under Section 237 (b) of the Judiciary Act (28 U. S. C. A. 344 (b)).

B. The Merits.

(1) The Opelika "City License Schedule for 1939" Brought in Question is a Valid Exercise of the Sovereign Power of the Municipality of Opelika and in no Unconstitutional Way Abridges or Restricts Petitioner's Right of Free Speech, Press, Conscience or Religion.

The First Amendment of the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; * * *." "The freedom of speech and of the press secured by the First Amendment against abridgment

[17b] *Box* v. *Metropolitan Life Insurance Company, supra.*

[18] *Louisiana Navigation Co.* v. *Oyster Commission, supra*, p. 101.

by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." (*Schneider* v. *State*, 308 U. S. 147, 160)[19]

With this fundamental and well settled interpretation respondent is of course in thorough accord. It concedes that in its operation of a municipal government it must observe the principles involved, but they are not the only principles involved.

This Court has said:

> "that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the States to make and alter their laws at pleasure is the greatest security for liberty and justice * * *". *Twining* v. *New Jersey*, 211 U. S. 78, 106.

Petitioner contends that because he is a minister of God he is free from the obligation created by the ordinance that persons engaged in the selling of books in the City of Opelika shall pay a business privilege tax. The position of the petitioner is clearly set forth in his brief as follows:

> "The law of Almighty God is supreme, and when a law of the state requires His minister or ambassador to secure a license as a condition precedent to the doing of what Jehovah commands him to do, the minister must obey God and refuse to apply for the license. If he compromises and secures the license he must suffer everlasting death at the hand of Almighty God.

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[19] See also *Lovell* v. *City of Griffin*, 303 U. S. 444; *Gitlow* v. *New York*, 268 U. S. 652; *Stromberg* v. *California*, 283 U. S. 359; *Whitney* v. *California*, 274 U. S. 357.

> "In such a conflicting situation the Constitution requires that the law yield to conscience of the individual molded by Jehovah God." (Petitioner's brief, p. 15)

The contention of the petitioner is well answered by the language of Mr. Justice Cardozo in *Hamilton* v. *Regents*, 293 U. S. 245, 268:

> "Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."

In the very recent decision of the Circuit Court of Appeals, First Circuit, in *City of Manchester et al* v. *Leiby*, 117 Fed. (2d) 661, 666 (certiorari denied, 313 U. S. 562), and with reference to similar contentions made by ordained ministers of the same sect, the Court said:

> "The civil authority can never concede the extreme claim that police regulations of general application not directed against any sect or creed—however widely the regulations may be accepted as being reasonable and proper—are constitutionally inapplicable to persons who sincerely believe the observance of them to be 'an insult to Almighty God.'"

The Trial Justice aptly summed up the matters involved in this case when, in addressing counsel for the petitioner, he said: "I don't think there is any question of religious liberty involved in this. You evidently do. I think it is purely a question of whether this defendant was violating a simple ordinance here that has been in effect for a long

time.. I do not think that this present defendant here has any more right to sell books on the streets than a person who is not a minister." (R. 46)

That ordinance which the Trial Justice properly described as the "simple ordinance" does no more nor less than set up a schedule of business privilege taxes for approximately two hundred and twenty-five different types of trades, professions or businesses plied in the City of Opelika. Separately listed along side each of the two hundred twenty-five odd categories, is the amount of tax charged in each case. The all-inclusive nature of the ordinance is demonstrated by the fact that Section 12 thereof sets up a procedure for the creation of classifications overlooked or which might come into existence subsequent to the enactment of the ordinance. (R. 24) Beyond any question (and there is no proof even suggesting anything contrary), the ordinance has as its only function the legitimate, legislative purpose of levying a business privilege tax on all those who desire to engage in any type of commercial calling within the municipality's jurisdiction For example, bootblacks are required to pay a tax of $5; auctioneers, $25; cabinetmakers, $10; florists, $25; lawyers, doctors, dentists, osteopaths, and other professional men, $15; piano tuners, $10; and finally, book agents, $10, under which petitioner was convicted. (R. 63)

It should be remembered that petitioner was not convicted for any alleged crime of going about the streets of Opelika selling literature. Nor can it be said that "It must be conceded that petitioner is an ordained minister, preaching the gospel, and that it was solely because he thus preached that he was arrested and prosecuted." Rather, his offense was simply that of selling books or pamphlets within the police jurisdiction of the City of Opelika *without having first paid the tax which all others similarly engaged were required by law to pay.* It is particularly desirable to keep this fact in mind in view of the charge by petitioner that "a gigantic wave of prosecutions and persecutions

against Jehovah's Witnesses * * *'' is sweeping over this ''land of the free and home of the brave''.''[20]

No amount of intemperate language can alter the fact that the only thing at issue in this case is the right of any community to assess and collect, under normal and traditional forms, taxes for the production of revenue needed to carry on the functions and duties of the government. It is respectfully submitted that that is all Opelika has done here. The particular type or form of tax employed is the business privilege tax, but it does not appear that any different argument or theory of law would be brought into action if instead an income, property, or sales tax were involved.

In view of the emphasis petitioner has placed upon the decided cases involving the related question of the validity of municipal ordinances subserving a police power function, and the further fact that a thorough analysis of the decided law on the questions raised by this appeal requires consideration and reasoning by analogy of these cases, this brief will deal with those decisions at some length. However, sight should not be lost of the fact that the case at bar in no respect relates to regulatory or police power action of a municipal government, but is concerned only with the municipality's right to levy taxes in the manner set forth in the ordinance.

It has not, nor do we think it can be, successfully contended that those engaged in press activities or religious callings are *per se* relieved from the normal tax and regulatory burdens incident to orderly and successful government. If the tax legitimately is aimed at the production of revenue and is not, either obviously or subtly, a means of achieving an illegitimate, unconstitutional purpose; or, if the regulation serves a real police power function, and is not a disguised menace to Constitutionally protected liberties, it may exist and be enforced against those pursuing press activities as well as religious callings.

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[20] Petitioner's Brief, p. 38.

"* * * The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. *Like others he must pay equitable and nondiscriminatory taxes on his business.*" (*Associated Press* v. *Labor Board*, 301 U. S. 103, 132-133) (Italics supplied)

This is axiomatic. One would hardly question that a news agent delivering papers by automobile must, like all others, secure license tags for his automobile, pay the prescribed tax and abide by all applicable regulations; marriages, though of vital religious significance, and in some instances an inseparable part of religious beliefs and sanctions can and regularly are regulated by municipalities under licensing ordinances, and parties wishing to be married may be required to tolerate a prescribed waiting period, or, in some cases, produce a certificate of freedom from venereal diseases before receiving a license.[21] Similarly, polygamy, though proper under the tenets of certain religious beliefs, may be outlawed, notwithstanding the claim for protection against the invasion of the right of free exercise of religious beliefs.[22] And though, as pointed out in *Manchester* v. *Leiby*, 117 F. (2d) 661, 666[23] and quoted by the Supreme Court of Alabama in *this case*, it might have been considered a gross impiety to members of one faith to be required to apply for a civil permit before partaking of a divine sacrament, under the National Prohibition Act (27 U. S. C. A. Section 1, *et seq*), the use of the sacramental wine was properly made the subject of such regulation and permit (See *Shapiro* v. *Lyle*, D. C., 30 F. (2d) 971).

The ordinance adopted by the City of Opelika does not in any respect purport to prohibit petitioner, or anyone

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[21] *Peterson* v. *Widule*, 157 Wis. 641, 147 N. W. 779.

[22] *Church of Jesus Christ of L. D. S.* v. *U. S.*, 136 U. S. 1; *Reynolds* v. *U. S.*, 98 U. S. 145.

[23] *Certiorari denied* 313 U. S. 562.

else, from publishing, distributing, or circulating literature pertaining to religion or any other subject or from engaging in the business of "book agent" or seller. Nor does it restrict in any sense his freedom to worship in whatever manner he sees fit. It has no such purpose deliberately, and it is patently false (if not somewhat anomalous) to say, as petitioner does, that:

> "While casual consideration might lead one to believe that the ordinance in question is one of the 'ordinary forms of taxation for support of the government', yet a more careful consideration thereof conclusively shows that it is adroitly aimed, whether unwittingly or deliberately, at *circulation* and can be misused to utterly destroy distribution of literature containing information and opinion." (Petitioner's Brief, p. 27)

How one may adroitly aim to do something unwittingly is left unexplained.

The ordinance creates no conditions precedent to the issuance of the license save the payment of the tax. In the present case, petitioner, as a book agent, was required to pay $10 for which, had he applied, he would unquestionably have received an annual license. There are no requirements concerning the qualifications of the applicant or of the books he wished to sell as to which the city had to be satisfied or could under the ordinance even consider. It had no alternative, had a license been sought, but to deliver the annual license upon receipt of the $10 tax. So clear is the city's duty under the ordinance in this respect that it would be without legal authority to withhold issuance of the license upon the tender of the fee and undoubtedly mandamus would lie to enforce its delivery (*Marbury* v. *Madison*, 1 Cranch 137).

(2) Lovell v. Griffin and related Nuisance or Police Power Cases Not Only do Not Require a Finding that Opelika Ordinance is Bad, but Negatively Establish the Propriety Thereof.

Petitioner maintains that this Court has resolved all doubts on this subject, and has ruled unequivocally that a state or municipality may not affect, regulate or interfere with in any manner those engaged in press or religious activities, either in the exercise of its police power or its sovereign right to tax. We are told that this Honorable Court has settled the rule as to police power activity in *Lovell* v. *Griffin*, 303 U. S. 444, and as relating to the taxing power in *Grosjean* v. *American Press Company*, 297 U. S. 233. We think both of these leading cases and the decisions following them, by their very delineation between the permissible and prohibited acts of a municipal government, clearly support the validity of the tax which petitioner was required to pay before engaging in the calling of book agent in the City of Opelika.

Lovell v. *Griffin, supra*, is settled authority for the proposition that a state or municipal government, in adopting regulations for the health, safety, and welfare of its people, may not prohibit the sale of literature or exercise anything in the nature of a previous restraint or prior censorship over the publication, circulation or distribution of printed matter under a system of licensing, or by any other method. In that case, the City of Griffin, Georgia, was engaged not in routine business privilege taxing or licensing, but in affirmatively barring the distribution of "circulars, handbooks, advertising, or literature of any kind" as a nuisance unless specific permission from the City Manager had been obtained. The ordinance was not general in character but was directed *only* at the prohibition and curtailment of these activities. This, indeed, was something entirely different from the ordinance involved in the instant case. Here was no perfunctory issuance of licenses to engage in any business upon the payment of a fee, but rather a pro-

hibition directed against one thing, namely, the distribution of press material without prior governmental examination (censorship) and approval. Such an ordinance, like all of those that have been struck down in the other cases cited on this proposition by petitioner, was declared void on its face as striking "at the very foundation of the freedom of the press by subjecting it to license and censorship."[24]

A few years later, this Court followed the doctrine of *Lovell* v. *Griffin* in *Schneider* v. *State*, 308 U. S. 147, holding a somewhat similar ordinance invalid, but took occasion to limit its view by stating that:

> "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty." (308 U. S. 147, 165)

And again in *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court having before it an ordinance, not general in character but limited to the activities of a particular group, which gave authority to the secretary of a state public welfare council to determine in a given case whether or not an applicant for permission to solicit funds for a religious cause was in fact representing a religious cause before issuing a permit, properly decided that the ordinance permitted what amounted to prior licensing and restraint on

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[24] To like effect are: *Kennedy* v. *City of Moscow*, 39 F. (2d) 26; *Reid* v. *Borough of Brookville, Pa.*, 39 F. (2d) 30; *Zimmerman* v. *Village of London*, 38 F. (2d) 582 (involving an absolute prohibition against soliciting without an invitation from the person solicited); *Donley* v. *City of Colorado Springs*, 40 F. S. 15 (likewise involving not a regulation of but a prohibition against soliciting); *State* v. *Woodruff*, 280 So. 577; *Commonwealth* v. *Reid*, 20 A. (2d) 841; *Wilson* v. *Russell*, 1 So. (2d) 569; *Village of South Holland* v. *Stein*, 26 N. E. (2d) 475; and others cited by petitioner, Petitioner's Brief, p. 33.

the free exercise of religion. The Court was careful to say, however, that:

> "It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." (310 U. S. 296, 304)

And this view of the Court, expressed in the form of dicta in the *Schneider* and *Cantwell cases*, formed the basis of the Court's opinion in *Cox et al.* v. *State of New Hampshire*, 312 U. S. 569, 61 S. C. Rep. 762 (decided March 31, 1941): There, a New Hampshire statute provided that parties desiring to parade through public streets must first secure a license and pay a prescribed fee. Certain Jehovah's Witnesses, ignoring the provisions of this statute, paraded through the streets of Manchester displaying signs bearing such legends as "Religion is a Snare and a Racket" and "Facsism or Freedom—Hear Judge Rutherford and Face the Facts," without securing a license or paying the fee required by the statute.

Holding that the government could, without impinging on constitutional rights, adopt such reasonable regulations pertaining to the use of its public ways, this Court said:

> "If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right."

And an ordinance of the City of Manchester (also challenged by members of the Company of Jehovah's Wit-

nesses) requiring peddlers or canvassers to obtain a badge of identification prior to selling on the streets was found valid and not subject to the charge of unlawful restriction on the freedom of press or the free exercise of religion. In its opinion, the Circuit Court of Appeals, First Circuit, said:

> "By contrast the Manchester ordinance now before us contains no element of prior censorship upon the distribution of literature. It requires only a simple routine act of obtaining a badge of identification before a person can sell on the streets. This reasonable police regulation, in our opinion, imposes no substantial burden upon the freedom of the press or the free exercise of religion.
>
> "No doubt, as in the case of any regulatory law, there is the possibility (though the record indicates no likelihood of it) that officials might act arbitrarily and in excess of their rightful powers in administering the ordinance. The superintendent of schools might arbitrarily withhold licenses from Jehovah's Witnesses, despite his mandatory duty to issue the badges upon receipt of applications 'properly executed.' A license once given might be revoked upon some trumped-up pretext. By Section 3, the badgeholder is required to conform to the ordinances of the city and the regulations of the board of mayor and aldermen; some outrageous regulation might be issued, and for non-compliance with it a license might be revoked under Section 4. What the legal situation would be if any of these or other possibilities came to pass need not be examined now. It suffices to say that recognition of such possibilities does not render the ordinance void on its face, nor justify an injunction at the behest of persons who have failed to take the simple step of applying for a badge—a badge which, so far as the record indicates, would have been issued out of hand, as a matter of routine ministerial duty." *City of Manchester et al.* v. *Leiby*, 117 F. (2d) 661, 666.

On April 7, 1941, this Court denied certiorari (313 U. S. 562, 61 S. C. Rep. 838).

Thus, it will be seen, so far as police regulations having to do with this subject are concerned, if the Court has before it that which purports to be an honest effort by the governmental agency to protect and provide for the health, safety and general welfare of all persons under its jurisdiction, in the absence of a showing that it is, in fact, a pernicious attempt to curtail, prohibit or restrain the rights protected to persons under the Fourteenth and First Amendments of the Constitution, then such regulations are declared to be valid notwithstanding the fact that they may to some extent bear a relationship to the press or religious activities of persons involved. Conversely, the Court will not permit deliberate invasions into the fundamental rights secured to all persons under the Constitution through the guise or camouflage of police regulations. It is respectfully submitted that there are no facts in the record which could conceivably support an analagous contention that the tax in the case at bar had that effect.

An effort has been made to confuse the ordinance in the *Lovell case* with that involved in the case at bar, the reasoning advanced being that since both employ the term "license" they must *ex necessitati* relate to the same thing, namely, governmental licensing and censorship so obnoxious to our form of government. This reasoning fails to recognize the many different senses in which the work "license" can be used. As employed in the ordinance in the *Lovell case* it did connote prior censorship, examination of material and ultimate permission or refusal to distribute based thereon. However, as used by the City of Opelika in its "City License Schedule of 1939" it is employed for little purpose other than to designate the fee charged with respect to the various avenues of endeavor listed.[25] Certainly

[25] Indeed, with marked frequency the word "license" is employed throughout the ordinance as though it were synonymous with the words "fee" or "tax". *E. g.*,

"• • • half of such *license* shall be charged and collected, • • •. (Sec. 2)

it implies nothing so sinister as a previous restraint on the business of publishing and distributing press material. Such was the holding of the Supreme Court of Arizona in *Giragi* v. *Moore*, 48 Arizona 33, 110 A. L. R. 314, 323, when it said:

> "First, it is said that the requirement that persons obtain a license before engaging or continuing in a business subject to the tax is a previous restraint on such business, in this case on the business of publishing a newspaper. No condition except payment of a license fee is attached to the issuance of the license. All persons who pay the fee are entitled to receive a license and for whatever location it may be applied for. * * *
>
> "It is said that, 'where the fee is exacted solely or primarily for revenue purposes and payment of the fee gives the right to carry on the business or occupation without the performance of any further conditions, it is not a license fee but a tax imposed under the power of taxation, regardless of the name by which it may be called.' 37 C. J. 170, Sec. 6."

And in the case of *Donnelly Corporation* v. *City of Bellevue*, 283 Ky. 152, 140 S. W. (2d) 1024, the Court of Appeals of Kentucky said this of a similar licensing ordinance:

> "We construe the term, however, not in the sense of being a grant or permission, but as descriptive of the tax and the document evidencing its payment. The penalty prescribed is not for distributing advertising matter, but for exercising the privilege without paying the tax. * * *"

"* * * the City of Opelika shall have a lien for such *license*, * * * as of the date the license is due, * * *. (Sec. 5)

"* * * shall pay the same *license* for such vocation, exhibitions or profession * * *. (Sec. 6)

"* * * who shall thereon fix a reasonable *license* for such business or vocation * * *. (Sec. 12)

"* * * shall pay such *license* on or before the day such business or vocation is actually begun * * *. (Sec. 13)

"All *licenses* will become delinquent * * * and an amount equal to 10 per cent of the amount of such *license* will be added * * *." (Sec. 14) (Italics supplied)

(3) The Grosjean Case and Those Following its Doctrine, Likewise Add to Rather than Detract from the Validity of Respondent's Position.

The *Grosjean case, supra,* relied upon by petitioner with as much finality as accompanies his presentation of the *Lovell case,* is authority for sustaining the tax in the case at bar. By pointing out the type of tax which may not be levied against press activities or, for that matter, any activity protected by the Fourteenth Amendment, it clearly demonstrates that the Opelika tax on book agents is valid. Had the State of Louisiana levied a general sales or license tax against all businesses, vocations, trades, and professions in the state, and set up a rate to be applied on newspapers, no constitutional question would have been involved. That is not what was done, however. As is now well known and has been judicially pointed out, the tax in the *Grosjean case* was the result of a deliberate political persecution of a hostile press:

> "It is a notorious fact that at the time the Grosjean case was decided, a situation existed in the state of Louisiana which was unparalleled in American history. A single individual had obtained a control over the entire executive, legislative and judicial machinery of that state as absolute as that exercised by any modern European dictatorship. * * * There was, however, a minority at least in that state, who were bitterly opposed to that dictatorship, and who were endeavoring to call the attention of the citizens to the situation, * * *. The only practical means which they had of presenting their cause to the people was through the press. The great majority of the larger newspapers of the state were opposed to the existing political set-up, while many, if not most, of the smaller periodicals took an opposite attitude. With this background, the statute involved in the Grosjean case was adopted. It imposed on all newspapers published in the state with a circulation of over 20,000 what was called a license tax for the privilege of doing business, and which amounted to 2% of the gross income of such papers, leaving untaxed all newspapers with a lesser circula-

tion. * * *" (*Giragi* v. *Moore*, 48 Ariz. 33; 110 A. L. R. 314, 325-326)

As applied to the newspapers that protested against the enforcement of this law, it imposed a tax of 2 per cent on the gross receipts derived from advertising carried in their newspaper when and only when each enjoyed a circulation of more than 20,000 copies a week. The tax stood alone, included no other business enterprises and was directed solely at these newspapers. Actually, in operation, it was limited in applicability to but thirteen newspapers out of a total of one hundred sixty-three in the state, of which thirteen, twelve were active in opposition to the dominant political group in the state, which group controlled the legislature and at whose dictates the legislature passed the law.

On this highly aggravated state of facts, this Honorable Court found the law to be obnoxious to the Fourteenth Amendment of our Constitution. Again, as in the cases involving the exercise of police power, this Court was careful to state:

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." (*Grosjean* v. *American Press Co., supra,* p. 250)

Significantly, the Court added:

> "The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." (*Grosjean* v. *American Press Company, supra,* p. 250)

The "wholly different" situation thus referred to by Mr. Justice Sutherland is the case at bar. It also was the situation present in *Giragi* v. *Moore*, 48 Arizona 33, 110 A. L. R. 314. There the State of Arizona levied a general privilege or sales tax based upon gross income "of practically every person or concern engaged in selling merchandise or services in the state." (110. A. L. R. 322). The Arizona law, although different from many practical standpoints, is strikingly similar to the ordinance involved in the case at bar as far as constitutional questions are presented. For example, Section 11 of the law "provides that every person engaging or continuing in a business required to pay the tax shall apply for and obtain a license * * *" and "that parties failing to procure such license or display it shall be punished by a fine of not less than $10 or by imprisonment * * *". As in the instant case, it was there charged that the requirement that persons obtain a license before engaging in press activities amounted to a previous restraint made unlawful by the Fourteenth Amendment. The Arizona Supreme Court, finding the case distinguishable from *Grosjean* v. *American Press Company, supra,* and following the general rule which provides no immunity from ordinary forms of taxation to those engaged in press activities, found the tax valid. The court said:

> "No condition except payment of a license fee is attached to the issuance of the license. All persons who pay the fee are entitled to receive a license and for whatever location it may be applied for. The amount of the fee is fixed and unvarying and is paid but once * * *. It is said that 'where the fee is exacted solely or primarily for revenue purposes and payment of the fee gives the right to carry on the business or occupation without the performance of any further conditions, it is not a license fee but a tax imposed under the power of taxation, regardless of the name by which it may be called.' 37 C. J. 170, Sec. 6."

Finally, dealing with the *Grosjean case*, the court said:

"What the court said, and what it meant to say evidently, was that the tax there being discussed was not one of the ordinary forms of taxation but extraordinary. The tax is 'single in kind' and extraordinary, not only in the respects mentioned by the court, but because the newspapers paying it cannot pass it on to the ultimate consumer without losing him to competing newspapers not paying the tax. It is a cleverly devised scheme under the guise of taxation to punish enemies and reward friends. In *Commonwealth* v. *Boston Transcript Company*, 249 Mass. 477, 144 N. E. 400, 402, 35 A. L. R. 1, 6, it is said: 'they (newspaper publishers) have no special immunities. They do not constitute a privileged class. They are entitled to invoke constitutional guaranties in common with others.' The rule contended for would certainly place the publishers of newspapers in a favored class. It would permit the taxing of all other businesses upon their sales or gross income and exempt newspapers and other publications. The Supreme Court would have to say in the plainest and most unequivocal language that the burden of taxation should not be borne by the press and all others taxed before we would believe that court intended such a rule. Certainly it has not so stated in the Grosjean case. * * *

"The mere fact that a tax reduces a person's net income is no legal restraint on him or his business. If the taxpayer is a newspaper publisher, it must appear that the law not only 'takes money from the pockets,' but also that the law was adopted by the state as a 'form of previous restraint upon printed publications, or their circulation.' If it is so adopted, then, however small the tax may be, it is bad and in violation of due process. It is not the amount of the tax, but the use of it as a means to abridge the freedom of the press, that is forbidden. The adoption of chapter 77, supra, was for the sole purpose of raising revenue and is, therefore, not within the spirit of the prohibition of the Fourteenth Amendment against depriving one of the fundamental right of due process."

When the Supreme Court of the United States was asked to review the action of the Arizona Supreme Court, it rendered a *per curiam* decision:

> "The appeal herein is dismissed for the want of a substantial federal question. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250; *Associated Press* v. *National Labor Relations Board*, ante, p. 103. * * *" (*Giragi, et al.* v. *Moore, et al*, 301 U. S. 670)

Again, in *Arizona Publishing Company* v. *O'Neil, et al.*, 22 F. Sup. 117, affirmed 304 U. S. 543, this taxing statute was attacked on the grounds of its alleged tendency to restrain a free press. The District Court said:

> "Plaintiff's contention is not new. The same contention was made in *Giragi* v. *Moore*, 64 P. (2d) 819; 110 A. L. R. 314, and was by the Supreme Court of Arizona unanimously rejected. An appeal from that decision was dismissed by the Supreme Court of the United States 'for the want of a substantial federal question'. 301 U. S. 670, 57 S. Ct. 946, 81 L. Ed. 1334. With the views expressed by Judge Ross in the main opinion and by Judge Lockwood in his concurring opinion in the Giragi case, we are in complete agreement. To repeat here what was said there would serve no useful purpose."

And recently in the case of *Donnelly Corporation* v. *City of Bellevue*, 283 Ky. 152; 140 S. W. (2d) 1024 (decided May 21, 1940), involving an ordinance requiring a $25 privilege license for the distribution of pamphlets and circulars, the Court of Appeals of Kentucky distinguished the *Lovell case, supra*, and upheld the right of the community to impose the license requirement, pointing out that the ordinance involved constituted an imposition of a tax rather than an abridgment of the right of free speech, and therefore lawful. The Court said:

> "There is, however, a clear distinction between the ordinances held by the Supreme Court to be abridgments of the right of free speech and press and the

ordinance before us. It does not undertake either to prohibit or restrict the distribution of literature of any sort. It only imposes a tax upon the privilege of carrying on the business of advertising in a particular manner. Absent from the ordinance is any censorship of substance or form. No power of discrimination as between any persons or class of citizens is reserved or exercised. The privilege of distributing advertising matter is available to any one paying the tax. True it is that a license is required. We construe the term, however, not in the sense of being a grant or permission, but as descriptive of the tax and the document evidencing its payment. The penalty prescribed is not for distributing advertising matter but for exercising the privilege without paying the tax. * * *"

Petitioner's attempted avoidance of the impact of this case on the basis that the material in the pamphlets circulated carried an advertising message rather than, as he puts it, "informative material" is not sound for it implies a limitation on free speech that does not exist. The mere fact that the ordinance speaks only in terms of advertising matter rather than literature generally does not in any respect lessen the forcefulness of the decision from the standpoint of the right of a community to affect, by proper legislation, the distribution, publication or circulation of printed matter. The following from the decision makes that clear:

> "If the right of the state or a municipal subdivision merely to exact a reasonable license tax for the privilege of carrying on the business of distributing advertising matter, or even of publishing a newspaper, for private profit, be denied as an abridgment of freedom of speech or press, then there is a clash with the fundamental social and political philosophy and constitutional mandate of equality of right and equality of burden. * * *" (140 S. W. (2d) p. 1026)

No later than October 13, 1941, the day on which certiorari was granted in the case at bar, this Court denied certiorari in the case of *Cole* v. *City of Fort Smith,* 151

S. W. (2d) 1000.[25a] There, the Supreme Court of Arkansas sustained the doctrine that a municipality may, in adopting a general taxing law, levy a license fee or tax on those who would sell or offer for sale books, pamphlets or other periodicals. In that case, the defendant was convicted of the violation of an ordinance which provided:

> "Section 1. That the license hereinafter named shall be fixed and imposed and collected at the following rates and sums and it shall be unlawful for any person or persons to exercise or pursue any of the following vocations of business in the City of Fort Smith, Arkansas, without first having obtained a license therefor from the City Clerk and having paid for the same in gold, silver or United States currency as hereinafter provided * * * Section 40. For each person peddling dry goods, notions, wearing apparel, household goods or other articles not herein or otherwise specifically mentioned $25.00 per month, $10.00 per week, $2.50 per day * * *."

The defendant was found guilty of having carried on the business of selling religious books at 25 cents per copy without first paying the prescribed tax and procuring the license. The Arkansas Supreme Court held that *Lovell v. Griffin, supra*, was clearly distinguishable and that the tax involved was a valid business privilege tax from which the Constitution of the United States grants no immunity for one engaged in a religious calling. The Court said:

> "Under this ordinance these two appellants were charged with carrying on the business of peddling religious books at twenty-five cents per copy without first having procured a license. We think it clear that this ordinance is broad enough to embrace the character of goods, under the term 'other articles,' that appellants were peddling, under the facts presented. We think it can make no difference as to what motives, religious or otherwise, that may have prompted appel-

[25a] Reported in the Supreme Court of The United States as *Bowden* and *Sanders* v. *City of Fort Smith, Arkansas*, 46 L. Ed. (Adv. Sheets), 80.

lants to peddle these books. We think there is no inhibition in the Constitution of the United States against the imposition of the license imposed by the ordinance in question. A similar question was presented in the case of *Cook* v. *City of Harrison*, 180 Ark. 546; 21 S. W. (2d) 966, 967, in which one of Jehovah's Witnesses had appealed from a conviction of violating an ordinance of the City of Harrison, the applicable provisions of which were: 'That it shall be unlawful for any person or persons to engage in, exercise or pursue any of the following avocations or businesses without first having obtained and paid for a license therefor from the proper city officials, the amount of which license is hereby fixed as follows, to wit * * * Section 13. For each book, picture or picture frame peddler, five dollars ($5.00) per month, or twenty-five dollars ($25.00) per year. * * * Section 31. Whoever shall engage in any business for which a license is required by this ordinance without first obtaining and paying for same as above required, shall be deemed guilty of misdemeanor, and upon conviction shall be fined in any sum not exceeding three hundred dollars ($300.00).

"The facts in the Harrison case are in all respects similar to those presented here. There this Court said: 'The gist of appellant's contention for a reversal of the judgment is that the ordinance does not forbid the hawking or peddling of religious tracts or books, especially if the parties distributing them are prompted by religious motives. We find no such exception in the ordinance. No distinction appears in the ordinance between the character of books distributed or the motives prompting the distribution thereof. The Constitution of the state authorizes the imposition of a tax or license on hawkers or peddlers irrespective of the kind of goods, wares, or merchandise distributed by them, and there is no inhibition in the Constitution of the United States against the imposition of a tax or license upon them. The imposition of such a tax is not an abridgment of religious freedom or an infringement upon the constitutional guaranty of religious liberty.'

"We do not think the case of *Lovell* v. *Griffin*, 303 U. S. 444; 88 S. Ct. 666; 82 L. Ed. 949, controls here. The provisions of the ordinance considered there were

materially different from the one before us. We think the case of *Cook* v. *City of Harrison, supra,* controls here and that the ordinance under which appellants, Lois Bowden and Lada Sanders, were convicted is valid and constitutional and must stand. * * *" (151 S. W. (2d) 1000, 1003)

The cases of *Semansky* v. *Stork,* 199 So. 129, *State* v. *Meredith,* 15 S. E. (2d) 678, *Thomas* v. *City of Atlanta,* 1 S. E. (2d) 598, and like decisions, cited by petitioner do not go beyond holding under each individual set of facts therein involved that the Jehovah's Witness before the court was not a peddler within the meaning of the particular statute. Here there can be no question but that petitioner was found to be a "book agent" within the meaning of the ordinance. The testimony on which he was convicted was that he was offering certain pamphlets or books for sale—two for five cents. Nothing appearing on the pamphlets themselves negatives the conclusion that sales of the books were attempted and made.[26] Thus, not because petitioner sub-

[26] The pamphlets themselves contain various advertising material with respect to other publications, such as coupons reading:

"Watch Tower, 117 Adams St., Brooklyn, N. Y. Please send me the magazine *The Watchtower* for one year together with the book ..... and the booklet *Face the Facts.* Enclosed is my voluntary contribution of $1.00 toward the wider publication of the Kingdom Message.

Name .....

Address .....

City and State .....

This special offer expires April 30, 1939".

And at another place, after listing the titles of other books—

"All in attractive cloth binding, cover embossings, gold lettered illustrated in color, indexed, and each of 352 or more pages of Scripture and facts. All sixteen books on your subscription of $4.00; any four $1.00; single book, 25¢ sent to you anywhere postage prepaid by us. For free illustrated booklet describing the above and all other publications by Judge Rutherford write to

The Watch Tower, 117 Adams Street, Brooklyn, N. Y."

scribed to certain religious beliefs, or, because he was selling or attempting to sell books in Opelika, but, because he engaged in the business or calling of book agent, in Opelika, without paying the tax due, he was arrested and convicted. It is not our point that free speech, press or religion will be protected only when no charge in connection with the exercise thereof is made, but rather that when the exercise of these rights coincides with a commercial enterprise, laws and non-discriminatory taxes relating thereto apply.

And the case of *State of Vermont* v. *Elva Greaves*, ——— At. (2d) ——— (decided November 5, 1941), authoritatively relied on by petitioner is obviously inapplicable as a guide to the Court's decision in the case at bar if for no other reason than that the ordinance there involved contained a provision not unlike that in the *Lovell case, supra,* requiring the license board to satisfy itself upon "satisfactory proof" that the applicant for a license "is of good moral character and reputation". Section 5 of that ordinance provides as follows:

> "Sec. 5. Before a license shall be granted a written application shall be presented to the license board signed by the applicant. In it the applicant shall state his place of residence, with street and number, the particular kind of a license he desires, and that he will observe the conditions of his license and all provisions of the ordinances governing same, and the applicant shall present satisfactory proof to said license board that he is of good moral character and reputation. The applications shall be filed in the office of the city clerk."

And elsewhere after a list of available pamphlets—

> "Any thirteen you select, on a contribution of 50¢, any six, 25¢; any one, 5¢, and mailed to your address postpaid."

"Enemies," another publication, is advertised as a "book of 384 pages, beautifully bound in cloth. * * *"

(4) The License Requirement Being Valid on Its Face Required Observance, and Petitioner Cannot be Heard to Complain of a Revocation Clause in no way Prejudicing Him.

The requirement that petitioner pay for and secure a license to engage in the calling of book agent was valid on its face and petitioner's conduct in offering books for sale without securing such license subjected him to the penalties set forth in the ordinance. He is in no position to "complain because of his anticipation of improper action in administration" (*Smith* v. *Cahoon*, 283 U. S. 553). See also *Lehon* v. *Atlanta*, 242 U. S. 53.

Petitioner charges that Section 1 of the ordinance, which provides for revocation of licenses in the discretion of the City Commission "with or without notice to the licensee," is invalid and for that reason petitioner was entitled to ignore the ordinance *in toto*. It does not appear necessary or proper to go into the question of the validity or invalidity of that provision, since no license having been sought or obtained by petitioner the question of the validity of that section of the ordinance having to do with revocation thereof is not germane. *Ex Parte Byrd*, 84 Ala. 17, 4 So. 397; *Little* v. *City of Attala*, 4 Ala. App. 287, 58 So. 949. Its invalidity could only be of significance if the section were inseparable, thus rendering the entire ordinance void. *Smith* v. *Cahoon*, *supra*.

Section 1, however, is separable from the ordinance, and if invalid does not vitiate the whole. The ordinance contains a section which provides:

> "Should any section, condition, or profision [sic] or any rate or amount scheduled as against any particular occupation exhibited in the foregoing schedule be held void or invalid, such invalidity shall not affect any other section, rate or provision of this license schedule." (R. 38)

It is now well settled that a provision such as this creates the presumption that, eliminating invalid parts, the legislature would have been satisfied with the remainder, and reverses any presumption that the legislature intended the act to be effective as an entirety or not at all. *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Electric Bond and Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419.

Furthermore, irrespective of the separability clause, it is otherwise clear that the legislative intent, namely, to create a schedule of taxes and fees assessable against those engaging in business in Opelika, is fully carried out to all intents and purposes even though Section 1 were struck down. To preclude revocations without notice does not alter the principle aim of the ordinance. Nor does it make obscure that about which the legislature intended to legislate.

Brazee v. *Michigan*, 241 U. S. 340.
Railroad Retirement Board v. *Alton*, 295 U. S. 330.
Carter v. *Carter Coal Co.*, 298 U. S. 238.

See also:

Sloss-Sheffield Steel & Iron Co. v. *Smith*, 175 Ala. 260; 57 So. 29.
Ex Parte Bizzell, 112 Ala. 210, 21 So. 371.
Mayor and Aldermen of Birmingham v. *Alabama Great Southern Railroad Co.*, 98 Ala. 134.
Lowndes County v. *Hunter*, 49 Ala. 507.

In *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419 (decided March, 1938), the petitioner was not permitted to attack the constitutionality of the registration provisions of the Public Utility Holding Company Act by contending they were inseparably connected with allegedly invalid regulatory provisions not yet employed by the Commission. This Court upheld the registration provision without regard to the regulatory provisions because it found that Congress had a definite purpose

in the registration itself unaffected or changed by the regulatory sections.

The present case presents a parallel situation. The principal purpose of the ordinance is the scheduling and collection of the prescribed fees. This aim is unaffected by the procedural section dealing with revocations and consequently is left intact even though Section 1 were found to be invalid.

CONCLUSION.

We respectfully submit that

(1) The appeal should be dismissed for want of jurisdiction; but if not

(2) The decision of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

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